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No. 10-1136

IN THE

Supreme Court of the United States

JONATHAN LOPEZ,

Petitioner,

v.

KELLY G. CANDAELE, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. The Circuits Are Deeply Divided in Their Application of Article III Standing for First Amendment Facial Challenges.

A. In the Third Circuit, Students Have Standing to Facially Challenge Policies that Chill Their Speech.

The fog created by Respondents' arguments cannot obscure a basic reality: *McCauley v. University of the Virgin Islands,* 618 F.3d 232 (3d Cir. 2010), and the Ninth Circuit's decision in this case are incompatible. In the Third Circuit, students have Article III standing to facially challenge college policies that regulate their speech when those policies have the mere "potential" to chill speech. *Id.* at 238. In the Ninth Circuit, students have no standing to challenge such policies, even when the students demonstrate an objective chill on speech—caused by a policy that instructs them to not speak if they might "offend" someone—and uncontroverted evidence of actual and threatened enforcement. App. 8-13a, 110-12a, 114-15a, 121-24a, 126-27a. It is vital that this Court establish a uniform, national standard: a student whose speech is objectively chilled by the speech code of the university he or she attends has Article III standing to challenge it to vindicate the First Amendment.

Respondents overlook the square conflict between the Third and Ninth Circuits. Mr. McCauley had standing to challenge speech-restrictive policies based on allegations that those policies chilled his

ability to speak freely. *McCauley*, 618 F.3d at 237-38. But the Ninth Circuit rejected Jonathan Lopez's standing, despite uncontroverted evidence of an objective chill based on actual and threatened censorship under the speech code. App. 23-26a. Respondents admit McCauley had Article III standing to challenge "the policy," Resp't Br. at 4, but they incorrectly "assume[]," *id.* at 6, that the university's punishment of his speech under Paragraph E of the Student Code of Conduct, licensed him to challenge Paragraphs B, H, and R of the Code also. However, the Third Circuit analyzed McCauley's Article III standing to challenge each paragraph, and concluded he lacked standing to challenge Paragraph C, only because it did "not prohibit speech." 618 F.3d at 238-39.

By contrast, McCauley had standing to challenge paragraphs that regulated his speech, even when he experienced no actual or threatened enforcement, because those paragraphs had the *potential* to chill his speech. *Id.* at 238. Thus, the Third Circuit analyzed Article III standing for each paragraph of the Code and found McCauley merited standing for each paragraph that "chilled" his speech. *Id.* at 238-39.

Further, *McCauley* is buttressed by *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), and *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008), which permitted students to facially challenge policies that chilled their speech.

In *DeJohn*, the student "felt inhibited" in talking about "women in combat and women in the military," because he "believed" these topics "were implicated by the [sexual harassment] policy," and could result in his punishment. *Id.* at 305.

In *Saxe*, the students felt "compelled by their religion" to speak about "homosexuality," but "feared" punishment under the school district's sexual harassment policy. 240 F.3d at 203. The district court found, and the Third Circuit upheld, that there was "no want of a proper party" because "the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish." *Saxe v. State Coll. Area Sch. Dist.*, 77 F. Supp. 2d 621, 625 (M.D. Pa. 1999), *rev'd on other grounds*, 240 F.3d at 203-04.

Neither *DeJohn* nor *Saxe* involved actual or threatened punishment, aside from the threat of punishment latent in the policy. Yet, in both cases, the Third Circuit allowed the students to challenge facially the sexual harassment policies. The Ninth Circuit would have rejected the Article III standing of these plaintiffs. That is clear from the facts of this case: Lopez not only suffers a chill upon his speech due to Respondents' speech code, App. 116a, 126-28a; his professor censored him for allegedly creating an "offensive" environment under the speech code; his professor threatened him with the speech code on a later assignment; and his peers pleaded for his punishment for "offending" them, App. 9-12a, 111a, 114-15a, 118a, 121-22a, 126-27a. Respondents fail

to rebut this evidence. But despite this actual and threatened enforcement, which is more than adequate for standing in the Third Circuit, the Ninth Circuit rejected Lopez's standing to challenge the speech code.

The Ninth Circuit's decision in this case conflicts directly with *McCauley* and necessitates resolution by this Court.

B. In the Sixth and Seventh Circuits, Students Have Standing to Facially Challenge Policies that Chill Their Speech.

The Sixth and Seventh Circuits apply the correct standing rule as articulated by this Court: students have standing to facially challenge college policies that chill their speech. As a result, students in those jurisdictions challenged successfully speech-restrictive policies without any of the attendant evidence of actual and threatened enforcement that Lopez suffered in this case.

Although Respondents classify *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), as an overbreadth standing case, the Sixth Circuit affirmed the district court's conclusion that the students suffered a "direct injury" from the policy. *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477, 480 (E.D. Mich. 1993). This merited standing to challenge the policy, based on "an exception to the traditional rules of standing," which "allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a certain

statute is so broad as to 'chill'" speech. *Dambrot*, 55 F.3d at 1182.

The Sixth Circuit recognizes a sufficient injury-in-fact based on the speaker's allegations of chill and the expectation that the government enforces its laws. *See id.* at 1183 (rejecting the university's argument that the policy would not apply to the student-plaintiffs' speech). But the Ninth Circuit required Lopez to prove that Respondents interpret the speech code to apply to his speech—a fact that a savvy government defendant can simply deny. The Sixth Circuit forecloses such come-lately government renderings and focuses instead on the objective reasonableness of the speaker's chill based on the language of the policy.

Respondents point to *Morrison v. Board of Education of Boyd County*, 521 F.3d 602 (6th Cir. 2008), as the Sixth Circuit's rejection of *Dambrot*. Upon closer inspection, however, *Morrison* was a vastly different case from *Dambrot* and this one. *Morrison* involved an as-applied claim for nominal damages based on a school district's harassment policy adopted during the litigation, *id.* at 607-08, not a facial challenge to a speech code that caused actual censorship, App. 9-12a, 70a. The policy in *Morrison* lacked an enforcement mechanism, 521 F.3d at 607, which caused the court to rely on this Court's limited decision in *Laird v. Tatum*, 408 U.S. 1, 10 (1972), a case involving a facial challenge to government activity that lacked any enforcement

mechanism.[1] Respondents have never denied the enforceability of their speech code, and the uncontroverted facts of Lopez's censorship confirm that viability. App. 117a, 119a.

Nothing in *Morrison* indicates that it superseded *Dambrot*. To the contrary, the cases have few similarities, and other Sixth Circuit decisions align with *Dambrot*. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) ("It is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact."). Unlike *Morrison*, the Ninth Circuit's decision here involves a non-moribund policy restricting student speech. App. 117a, 119a. Had Lopez attended a college in the Sixth Circuit and suffered the same censorship, he would have Article III standing to sue. In the Ninth Circuit, he does not.

Further, the Seventh Circuit's decision in *Zamecnik v. Indian Prairie School District #204*, -- F.3d --, 2011 WL 692059, *1 (7th Cir. Mar. 1, 2011), conferred standing to challenge an unlawful regulation of speech based on the student's fear of punishment. *Zamecnik* is consistent with Seventh Circuit (and Sixth Circuit) authority granting Article III standing to challenge laws that chill speech. *See, e.g.*, *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir.

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[1] Unlike the *Laird* plaintiffs, who challenged government activity they disagreed with, 408 U.S. at 9-10, Lopez challenges a policy that forces him to alter his speech, and under which he experienced actual and threatened punishment.

2003) (finding Article III standing to challenge political advertisement law on its face based on threat to speech "latent in the existence of the statute"). The Ninth Circuit's decision conflicts with the Sixth and Seventh Circuits' application of Article III standing to First Amendment facial challenges. The Petition should be granted to resolve this conflict.

C. Five Other Circuits Permit First Amendment Facial Challenges Based Upon Chilled Speech.

Respondents dismiss the First Amendment pre-enforcement holdings of the First, Second, Fifth, Eleventh, and District of Columbia Circuits on the grounds that the Ninth Circuit's decision does not prohibit pre-enforcement challenges, but merely that Lopez did not make such a challenge. Resp't Br. at 12-13. In doing so, however, Respondents ignore the conflict between the Ninth Circuit and these other circuits. The general rule among these circuits is that an injury-in-fact is established by an objective chill on speech caused by an enforceable government law, which is precisely what Lopez has experienced. *See, e.g., Act Now to Stop War & End Racism Coalition v. District of Columbia* ("*ANSWER*"), 589 F.3d 433, 435 (D.C. Cir. 2009) ("standing to challenge laws burdening expressive rights requires only a credible statement by the plaintiff of intent to commit violative acts and a conventional background expectation that the government will enforce the law.") (citation and quotation marks omitted); *see also* Pet. at 30-33 (citing cases in each of the five circuits mentioned).

II. The Need to Resolve the Circuit Split and Protect the "Marketplace of Ideas" for Students Is of Exceptional Importance.

This case presents a circuit split that threatens to eviscerate student speech in the "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972). Through this case, the Court can reaffirm a simple and straightforward standing rule: a student whose speech is objectively chilled by the speech code of the university he or she attends has standing to challenge it to vindicate the First Amendment. However, if left to stand, the Ninth Circuit's decision will give the government plausible deniability when sued by citizens for facially invalid laws, will allow campus speech codes to proliferate, and will elevate more marginally protected speech over student speech in the "marketplace of ideas."

A. The Decision Below Bars College Students from Exercising Their First Amendment Rights on Campus.

The Ninth Circuit's decision ignores the appropriate standing considerations in First Amendment cases and erects an insurmountable barrier to students who want to exercise their First Amendment rights on campus.

This Court has long held that an injury-in-fact is established when a "law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution."

Virginia v. Am. Booksellers, Inc., 484 U.S. 383, 393 (1988); *see Brockett v. Spokane Arcade*, 472 U.S. 491, 504 (1985) ("where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish, . . . [then t]here is then no want of a proper party to challenge the statute").

Rather than following this Article III standing precedent, the Ninth Circuit's decision all but eliminates the ability of students to challenge speech-restrictive policies on their face. To be sure, the decision below presents students with a Sisyphean task: establish Article III standing by proving that the *government's interpretation* of the policy applies to your speech, that you intend to violate the policy, and guarantee that the government will follow through with the threatened enforcement. App. 17a. Aside from departing from established precedent,[2] this task proves especially troublesome for challenges to overbroad and vague

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[2] The Ninth Circuit's focus on the applicability of the policy "as interpreted by the government" conflicts with this Court's decisions that confer Article III standing based on the plaintiff's objectively reasonable interpretation of the statute. *Am. Booksellers*, 484 U.S. at 392; *see also United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

laws, which have no clear boundary or interpretation. While students can establish what they intend to say (as Lopez has done), once challenged in court, the government may attempt to disavow or interpret its policy in ways that render the policy inapplicable to the plaintiff's intended speech simply to avoid liability. Under the Ninth Circuit's standard, the thoughtful government attorney need only argue that her client does not interpret the policy that way or will no longer apply the policy to the plaintiff's speech—after he already experienced speech-chilling threats of punishment. The Ninth Circuit gives the government plausible deniability, able to overcome any assertion by the plaintiff that the overbroad and vague policy chills his speech. Article III standing cannot turn on the government's self-serving maneuvers to declare arbitrarily that it will not enforce a speech prohibition against a student when the plain wording of the prohibition indicates that it applies to the student.

The dangerous impact of the Ninth Circuit's standard is evident from this case. Despite Lopez's uncontradicted evidence of actual and threatened enforcement of the speech code by his professor and peers, and an objectively overbroad policy that instructs students, "[i]f unsure if certain comments or behavior are offensive, do not do it, do not say it," App. 123a, Respondents utilize the Ninth Circuit's standing barrier to disclaim the applicability of the speech code. They focus solely on Board Rule 15003(A) and label the other portions of the policy as only "aspirational." Resp't Br. at 13-18. But

Respondents speech code includes much more than just §15003(A), as the District Court recognized.[3]

In stark contrast to the Ninth Circuit, other circuits do not give the government plausible deniability when considering Article III standing. In cases of overbroad or vague regulations of speech, "there is nothing to ensure the University will not violate First Amendment rights even if that is not their intention." *Dambrot*, 55 F.3d at 1183. Instead, there is a "conventional background expectation that the government will enforce the law." *ANSWER*, 589 F.3d at 435.

The Ninth Circuit's decision also disregards the widespread threats to student speech on college campuses today. As the Amicus Brief from the Foundation for Individual Rights in Education notes, despite decades of federal precedent invalidating overbroad and vague university speech codes, they persist across the country and present an objective threat to student speech. Amicus Br. at 4-9. Based on reports of censorship and punishment of students like Lopez, it is eminently reasonable for students to feel an objective chill on their speech, and it is simply unreasonable to allow the Ninth Circuit's decision to block students' access to the courts on that basis. Without intervention by this Court, speech codes will proliferate and chill student speech.

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[3] The District Court preliminarily enjoined and ordered stricken §15003(A) and the policy found on the websites. App. 89a.

B. The Ninth Circuit Inverts the Constitutional Protections for Speakers at the Highest Rungs of the First Amendment.

Respondents argue the decision below well serves Article III standing. Resp't Br. at 20-22. But the decision actually makes fully protected speech on campus an Article III loser, as forms of speech more susceptible to constitutional limitation are given standing to sue more freely.

Political action committees have greater access to the courts, even in the Ninth Circuit, when faced with laws that chill their speech. *See, e.g., Citizens United v. F.E.C.*, 130 S. Ct. 876, 888 (2010) (facial challenge to campaign finance law based on fear of prosecution); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1005 (9th Cir. 2003) (facial challenge to voter guide disclosure law based on fear of prosecution).

Even sexually oriented businesses benefit from a a more permissive Article III standing rule in First Amendment cases than that applied here. *See, e.g., Am. Booksellers*, 484 U.S. at 393 (facial challenge to law restricting sexually explicit material based on fear of punishment from plaintiffs' interpretation of law); *Brockett*, 472 U.S. at 494 (facial overbreadth challenge to obscenity law four days after effective date); *Legend Night Club v. Miller*, -- F.3d --, 2011 WL 541136, *1, 3 (4th Cir. Feb. 17, 2011) (facial challenge permitted despite little probability of enforcement and no evidence that plaintiffs were

subject to the law); *LSO Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000) (facial challenge to law that might threaten plaintiff's activities).

The practical result of the Ninth Circuit's decision is an insurmountable barrier to the federal courts for students whose speech is chilled by the policies of the university they attend. Under the Ninth Circuit's decision, those litigants, whose First Amendment rights are at their zenith in the "marketplace of ideas" and who experience objectively reasonable chills based on overbroad or vague university policies, receive less constitutional protection than litigants engaged in forms of speech that may be restricted more freely. This upside down result pays too much deference to college administrators, who may now hide unconstitutional speech codes behind the Ninth Circuit's insurmountable standing barrier. Left in place, the Ninth Circuit's decision leaves students with a Hobson's choice: speak and jeopardize a college education, or self-censor and abandon one's First Amendment rights. The Court should grant review to resolve this issue of exceptional national importance.

CONCLUSION

The Petition should be granted (along with the Petition in *Rock for Life v. Hrabowski*, No. 10-1137) to resolve the conflict among the circuits and establish a straightforward rule: a student whose speech is objectively chilled by the speech code of the university he or she attends has Article III standing to challenge it to vindicate the First Amendment.

Respectfully submitted,

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